1951

In the Matter of the Estate of James W. Linford : Brief of Respondents

Utah Supreme Court

Leon Fonnesbeck; Attorney for Respondents;

7348

In the Supreme Court of the State of Utah

IN THE MATTER OF THE ESTATE OF JAMES W. LINFORD, *Deceased.*

7348
Case No. ~~4040~~

RESPONDENTS' BRIEF

Appeal from the District Court of the First Judicial District of the State of Utah, in and for the County of Cache

Hon. Lewis Jones, Judge

LEON FONNESBECK
Attorney for Respondents.

Supplemental Index to Table of Contents.

Point 1. Comment on "Statement of Facts",- the same are incomplete and misleading.

Point 2. Argument on Appellant's Points,- said points are not supported by the facts nor the law.

Point 3. Argument in support of Motion to Dismiss Appeal, said motion should be granted because: (1) Neither minor child nor his guardian are made parties and no notice of appeal was served on them; and (2), this appeal was not taken in time,-the points complained about herein were found and settled April 24, 1950.

Point 4. Summary of points,- This appeal is without merit and should be dismissed, for:

(1) Administratrix stands convicted of neglect of duty, amounting to fraud.

(2) Appellant has presented no valid reason why decree of distribution should not be sustained.

(3) Said decree is based upon appellant's own accounts filed in court and upon her own Petition for Distribution.

(4) The lower court was very liberal with appellant.

(5) This court has no jurisdiction in this appeal, for: (a) James S. Linford is a beneficiary in the decree and a necessary party; (b) the matters complained of in this appeal were found and settled by the lower court in its Findings of Fact, Conclusions of Law, Order and Judgment entered April 24, 1950, from which no appeal was taken.

TABLE OF CONTENTS

INDEX TO CASES AND AUTHORITIES CITED

In the Supreme Court of the State of Utah

IN THE MATTER OF THE ESTATE OF JAMES W. LINFORD, *Deceased.*

Case No. 4040

RESPONDENTS' BRIEF

COMMENTS ON "STATEMENT OF FACTS"

Appellant's "Statement of Facts" is spotty and very incomplete and misleading. Some points and arguments, settled in the first appeal in this estate, In Re Linford's Estate, 207, P. 2nd 1033, (Ut.), are repeated while important and controlling facts are omitted, and many improper and misleading inferences are sought to be drawn.

For example: (1), On page 2 it is stated that notice of her "Final Account and Petition for Summary Distribution" was duly mailed to respondents, "that no objections were made or entered, and on Dec. 26, 1942, the court signed a decree of Summary Distribution . . . Whereupon Mrs. Linford, assuming the business to be hers as she had been given all of the assets by Court Decree, proceeded to operate it, working long hours, until Oct. 15, 1945, when she sold the entire business

including the real estate to Wm. A. Jones for $6,000.00.''

But appellant fails to state, as the uncontradicted testimony of Jean H. Linford shows, that he was in the armed services at that time and was not discharged from the Veterans Hospital until Nov. 2, 1945, and that he received no notice that she was asking to have all of the property distributed to herself, (tr. 37); that after convalesing and after getting married, he made arrangements with her (administratrix) to live in his father's home, but that on Feb. 10, 1948, she sent Jean a letter Ex. ''G'', asking him to move out, (tr. 38); that Jean then wrote his letter, Ex. ''H'', stating that he figured that descendant's children were entitled to part of the estate; that ''she was horrified at that suggestion'', (tr. 41); that later she offered us each $500.00'' (tr. 42)

Appellant also fails to state that the other adult heir, Phoebe L. Bingham and her husband, came up to see the administratrix, when she started probate proceedings (tr. 48), and that she told them it would work a hardship on her, requiring her to sell the business and thus depriving her of a living, if the heirs should then demand their share of the estate. That she would do the right thing, and they didn't need to worry about her doing the right thing (tr. 49, 57).

Appellant also fails to note that after she offered respondents $500 or $550 each, and because they didn't accept her offer right there, she wrote them a letter,

Ex. "I", stating that she had consulted her attorney, who said they were not entitled to anything, and now they would take what she would give them and settle on her terms, (tr. 53), and that shortly after that the Petition for Citation was filed against her.

(2), Appellant further evades the real facts and makes misleading inferences and conclusions on pages 4 and 5. It is true that a hearing was had on April 5, 1950, but it is not true that after that hearing, the court, about May 22, 1950, ordered the administratrix to file new Inventory and Appraisement. The facts are that after the hearing of April 5th, the lower court announced: "I'll make a finding that either as administratrix or as trustee, all of the property referred to in this proceeding, belonged to deceased and are assets of the estate (tr. 149); the court also stated that the inventory was not sufficiently definite and that he wanted her to file an account.

All this happened long before May 22, 1950. That was the date this matter came before the court on her motion for further time in which to file her account (tr. 157). The trial court granted her until June 5, 1950, to file her account of all the money she had collected, and stated that on failure to do so, that judgment would be entered against her (tr. 158).

(3) Appellant also neglects to state that in the fore part of June, 1950, she did file her "Final Account and

Petition for Settlement Thereof'' in which she showed and acknowledged cash receipts of $7,855.50, belonging to the estate, as the court had previously found.

(4) Appellant likewise neglects to state that in her said final account she listed a number of improper items as expenses, which the court listed and struck out, in Par. 9 of the Findings of Fact, signed and filed December 22, 1950.

If the court will read (tr. 158-164), it will see what a difficult time petitioners and the lower court had to get her to file an account of the money, cash, which she had collected, and also that she expected the court to allow her a salary of $200 per month for 3 years, $7200.00, while she operated the business of the Linford Upholstering Co., without filing any account of the earnings or operation of said business.

This court will also observe from the unverified pencil account which she at last did file (which had no vouchers or receipts of any kind to support it) and which we believe should have been stricken from the files. But when her counsel admitted a small net earning for the 3 year period, we decided to accept it, in the interest of a speedy settlement, as the court finds in Par. 7 of its Findings of Fact.

It should also be noted that on November 2, 1950, the administratrix flied her Petition for Distribution of Estate, prayed that due notice be given and that ''all

of the property of the said decedent may be distributed to the above named heirs, to-wit: Beatrice E. Linford Sorensen, Jean H. Linford, Phoebe L. Bingham and James Stephen Linford as provided by law".

It should also be noted that the lower court did not ask for any further *appraisement,* just asked her to file an inventory (tr. 156). But that she never did file a inventory of the piano and household furniture, as petitioners moved that she be required to do, as noted by the court in paragraph 4 page 3 of the Findings of Fact.

ARGUMENTS ON APPELLANT'S POINTS

Points 1-4. The first four points listed by appellant on page 6, are points which were raised, argued to, and settled by this court, in the first appeal, supra, and said matters are now settled, and cannot again be re-argued in this estate.

Point 5. The court erred in including the Wm. Hansen contract as assets of said estate, — On page 12 counsel argues that the legal title to the premises had been conveyed to Jean H. Linford and that he in turn had conveyed it to Beatrice E. Linford, and thereby he argues that she became the owner of the funds represented by the contract, even though the contract was payable to the decedent, and hence she shouldn't be required to account for the money collected on the Wm. Hansen contract to buy said premises. Even if the

naked legal title had been conveyed to her, that alone, we submit, would not be any reason why she should not account for the money collected by her on the contract for the sale of the premises, which was payable to the decedent and was considered to belong to him. Such were the facts here, but appellant again avoids the real facts.

Jean H. Linford testified that he had no interest in that property, that the money was payable to his father (tr. 43). The administratrix admitted that at the time of probate, she did not even know that the real estate, represented by the Wm. Hansen contract, had been put in her name, and the trial court remarked: "I'll take that answer" (tr. 143-4). She also expressly admitted that, at the time decedent died, the $550.00 and all interest payable under the Wm. Hansen contract, was payable to decedent and that she had collected all of it.

Q. Why didn't you list the Hansen contract when you knew it was payable to Linford? A. I don't know why I didn't list it (tr. 110). In addition, it should be noted that the trial court answered her counsel on this point as follows: "The son took the title to accomodate his father and then deeded it to Beatrice E. Linford, she held it as trustee for her husband" (tr. 151).

Point 6. The court erred in including the insurance

money. We see no merit to that argument. The administratrix admitted she received $268.50 from petitioners to apply on funeral expenses. In her final account, she takes and is allowed credit for the full amount of the funeral expenses, $387.35. Counsel gives no reason why she should not account for the $268.50. It certainly was not a gift to her. She got that money from petitioners under the representation to them that here was not enough money in the estate to bury their father.

Point 7. The court erred in including the $6000.00 received from Wm. A Jones. On page 16 appellant's counsel says: "This money did not exist when decedent died and was therefore not part of the estate". If that argument is sound, then no administrator would be liable for any sale of conversion of estate's property to his own use. For when the heirs complained, the administrator could simply answer: "The money I received for your father's property did not exist when your father died, and therefore it is no part of his estate".

Counsel repeats that the $6000.00, received from Wm. A. Jones for sale of Linford Upholstery Co. business including the real estate, "was a result of 3 years of hard work on the part of Beatrice E. Linford". There is no evidence in the record to support that statement. We have already pointed out that the administratrix begged the heirs, at the time she started probate, not

then to demand their share of the estate, as that would compel her to sell the business and would thus deprive her of a living. (tr. 48, 49, 57). Neither did the administratrix, in her testimony make such a claim. She testified there was a growth in the business between the time Linford died and when she sold the business 3 years later (tr. 146). She explained that this was due largely to conditions brought on by the war, when people could not buy new furniture, but had to have their old furniture repaired. She also testified: "At the time of his death there was work to be done in the shop. He had gone out the night before he died and brought in several pieces of furniture to be repaired, and I went in there and helped Mr. Passy repair that furniture and clean it up for customers' and I stayed and ran the business . . . In the 3 years that passed I made a great growth in the business (tr. 169). I didn't ask permission to operate the business (tr. 116).

Regarding the question of fraud, the lower court observed: "There never has been a petition filed for leave to operate this business . . . and never any account filed . . . I hesitate to make an express finding of direct fraud, but to that extent, yes (tr. 151). I find she failed and neglected to ask leave of the court to operate a going business, and failed and neglected to account to this court of her doings in the operation of that business. To that extent indirectly, the court makes a finding of fraud, and that she took all of the proceeds

and pocketed them out of the business'' (tr. 152)

Counsel complains that the court didn't allow her a salary during the three years she operated the business. The trial court asked counsel to submit or produce authority showing that the court was justified in allowing her a salary where she had operated the business of decedent without authority of court. Counsel failed to produce a single case so holding, and cites none in appellant's brief. We think the law is clearly against such a contention.

In 33 C.J.S. page 1171, Sec. 193, the head note reads: ''An executor or administrator may not engage in business with funds of the estate, and if he does so he is chargeable with all losses incurred and profits made.'' In the text on the next page the rule is stated thus:

> ''So great a breach of trust is it for the representative to engage in business with the funds of the estate that the law charges him with all the losses thereby incurred without on the other hand allowing him to receive the benefit of any profits which he may have made, the rule being that the persons beneficially interested in the estate may either hold the representative liable for the amount so used with interest, or at their election may take all of the profits which the representative has made by such unauthorized use of funds of the estate . . . Since the representative cannot deal with the property to his own advantage, he is not entitled to a salary for his own services to be deducted from the gross receipts.

In case at bar the administratrix not only fails to render any accounting of her living expenses taken out of that business during those 3 years, but she wants the court to allow her a salary out of estate funds, without even rendering a proper account showing the net earnings of the business during that three year period.

At the bottom of page 17 and on 18 appellant again argues that the grandchild, James Stephen Linford was not a proper party to the petition for citation filed against her by respondents. That point was settled by this court in the first appeal in this case, supra, where this court said:

> "There is no merit to the argument made by counsel that there is a defect and misjoinder of parties to petition for citation because James S. Linford, the aforementioned minor heir of deceased, was not made a party to the petition. It is not necessary that he should have been joined as a party. This is not an action against the administratrix, but rather a petition directing the court's attention to certain alleged improper fraudulent acts on the part of the administratrix, and requesting that the court require her to properly administer the estate . . . "

ARGUMENT IN SUPPORT OF MOTION TO DISMISS APPEAL

We think respondents Motion to Dismiss Appeal should be granted for two reasons: (1) Appellant did not make the grandchild James S. Linford a party to this appeal and no notice of appeal has been served

on him or his guardian, if he has a guardian. This is an appeal from a judgment and decree of distribution of estate, where the court granted and distributed $1195.94 to each of the three heirs. The appellant seeks to reverse and vacate the said decree, hence this appeal is just as much an action against James S. Linford, as it is against Jean H. Linford or Phoebe L. Bingham, for if appellant succeeds, the fruits and benefit of that decree will be wiped out and set aside as to all the heirs. Hence this appeal is really an action against all of the heirs, for it seeks to take away the benefit which the lower court awarded to each of them.

Hence we submit that James S. Lindford is a necessary party to this appeal, and that without making him a party and without any notice to him or his guardian, this court is without jurisdiction to vacate and set aside the findings of fact, conclusions of law and/or the judgment and decree of distribution, so far as the minor is concerned.

In 34 C. J. S. pg. 926, Sec. 1814, it is stated that proceedings for review of actions, by or against executor or administrator, are governed by rules that govern proceedings for review of civil actions. In 4 C. J. S. pg. 854, Sec. 391, the rule is stated thus:

> Generally all parties to the judgment or decree below whose interest will be directly affected, if the judgment or decree is sustained, reversed, or modified on appeal or writ of error must be made parties.

In addition, it should be kept in mind that the lower court specifically ordered that the minor child or his guardian should be given a copy of the accounting and notice of every proceeding by the administratrix (tr. 156). In the Order and Judgment signed and filed April 24, 1950, the lower court wrote the following: "It is further ordered that James S. Lindford be given notice of all proceedings or actions of said administratrix". This order has also been ignored by appellant and her councel.

(2), Our second reason why we think Motion to Dismiss Appeal should be granted is, that this appeal was not taken in time. All the items complained of by appellant were adjudged and settled by the court at the conclusion of the hearing of April 4-5 (tr. 149), when the trial court announced: "I'll make a finding that either as administratrix or as trustee, all of the property represented in this proceeding belonged to the desceased and were assets of the estate . . . Everything listed in the petition, because they were purchased from funds derived from the business, or assets of the estate at the time of his death".

The trial court even suggested that she might want to take an appeal from the ruling: "it may be gentlemen that under these new rules you may want to take an interlocutory appeal before going ahead with this thing". (Tr. 149) On April 24, 1950, Findings of Fact, Conclusions of Law, Order and Judgment was signed and filed.

These findings cover and settle the matters herein complained of by the appellant. The only reason the court didn't then settle the amount to be distributed to each heir, was that the court asked her to file her accounting of her cash reciepts as found by the court, and also, the court wanted her to file an accounting covering the three year period that she operated the business.

The Findings of Fact and Decree signed Dec. 22, 1950, is based on the findings of fact, conclusions of law and order signed and filed April 24, 1950, plus the small net earnings which she admitted over the 3 year period, $1089.84, as the court stated in Par. 7 of the Findings of Fact. She isn't complaining about the court adding the $1089.84. The matters of which she complains were settled and adjudged April 24, 1950, and no appeal has been taken from those findings and judgment then made by the court.

Hence we submit that the motion to dismiss the appeal should also be made on this second ground, that the appeal was not taken in time.

SUMMARY OF POINTS

To Summarize: Respondents submit that this appeal is wholly without merit and should be dismissed, because:

1. The administratrix stands convicted of gross neglect of duty, which practically amounts to fraud. Thus: (a), She admits collecting all of the six $100

Ariel Larsen mortgage notes payable to decedent, plus $132 interest, total $732, but accounted for only $500; (b) She admits collecting the Wm. Hansen contract, $550, payable to the decedent, plus $105 interest, total $655, but accounted for none of it. She likewise admits receiving $268.50 from the heirs, to apply on funeral expenses and likewise failed to account for that: (c) She admits that she operated the Linford Upholstering Co. business without court authority and then sold it for $6,000.00 cash, but failed to account for the $6,000.00 or any of the earnings of that business.

2. Counsel for appellant has presented no valid reason why the decree from which she appeals should not be sustained. It is based on her own verified Final Account and Petition for Settlement Thereof, filed in June 1950, showing admitted cash receipts of $7855.50 belonging to the estate, and her pencil unverified account, filed about Nov. 2, by which her counsel admitted a net earning of $1089.84, for the 3 year period, and her Petition for Distribution of Estate, also filed Nov. 2, 1950.

3. In her said petition for distribution she alleges: (1) That the entire estate has now ben reduced to cash and that there is not now any property other than cash, in the hands of the administratrix; (2) That the heirs are entitled to have the entire estate distributed to them as provided by law. Wherefore, she prayed that the property be so distributed, which is just what the court

did, when it distributed 1/3rd, $1793.91, to her, and the balance, $3587.82 to the three heirs, $1195.94 to each. So the distribution made by the court is based on her own accounts filed in court, and on her petition for distribution of the estate, money in her hands, to the heirs, as the law provides.

4. In settling her accounts the lower court, as well as the heirs, were very liberal to the administratrix; (1) The court allowed all the deductions she set up and claimed (although the same were not supported by any receipts or vouchers showing she had paid out that money), except the court struck the four items mentioned by the court in its finding No. 9, which were clearly illegal and not deductable as claims against the estate; (2) We accepted her counsel's statement that the net earnings for the three year period were only $1089.84 (when in fact they were $1622.32 even by her own questionable account.), thus granting her further advantage of $532.48; (3) In addition to that the court allowed her extra compensation, $640.00, which she was not entitled to under the Statute, Sec. 102-11-25 (U.C.A.), for she had not performed any "extraordinary services" as the basis for her extra compensation, as provided by that statute. She first reported the estate as amounting to only $1072.40, and she had all of the estate distributed to herself two months after the death of decedent.

5. Lastly, we submit this court has no jurisdiction

and respondents' Motion to Dismiss Appeal should be granted, for the two reasons above stated, to-wit: (1) James S. Linford is a beneficiary in said decree and is therefore a necessary party to this appeal proceeding, seeking to vacate and set aside said decree; neither the minor nor his guardian have been made a party to this proceeding, nor has any notice of appeal been served on either of them.

(2) The items complained of in this appeal, to-wit: (a) That the court charged her with collection of the Wm. Hansen contract, $655.00; (b) That the court charged her with collections under the Arial Larsen notes, $232.00; (c) That the court charged her with the $268.50 received from the heirs to apply on funeral expenses; and (d) The court charged her with the $6,000.00, she received from the sale of the business including the real estate, were all matters which were found and decided by the trial court in its finding of fact, conclusions of law and judgment, signed and filed April 24, 1950, and from which no appeal was ever taken. That said matters have therefore become final, res adjudicata, and cannot now be brought before this court, on appeal for reconsideration.

Respectfully submitted,

LEON FONNESBECK

Attorney for Respondents.